SAN MIGUEL POWER ASSOCIATION, INC.

IBLA 82-81 Decided June 15, 1982

Appeal from decision of the Colorado State Office, Bureau of Land Management, determining rental charge for right-of-way C-30187.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way -- Fees -- Rights-of-Way: Federal Land Policy and Management Act of 1976

Under Departmental regulation 43 CFR 2803.1-2(c) a nonprofit electric distribution cooperative whose principal source of revenue is customer charges is not eligible for an exemption or reduction of fair market rental imposed for a right-of-way under the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1976).

APPEARANCES: Robert R. Wilson, Esq., Cortez, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

San Miguel Power Association, Inc., has appealed from the September 25, 1981, decision of the Colorado State Office, Bureau of Land Management (BLM), that determined that the annual fair market rental value for right-of-way C-30187 is $5 and required a payment of $25 for the 5-year term. The right-of-way was issued on April 27, 1981, under Title 5 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (1976). Appellant contends that it should be exempt from paying any annual rental fee.

Section 504(g) of FLPMA, 43 U.S.C. § 1764(g) (1976), provides in applicable portion:

> The holder of a right-of-way shall pay annually in advance the fair market value thereof as determined by the Secretary

granting, issuing, or renewing such right-of-way * * * [r]ights-of-way may be granted, issued, or renewed to a Federal, State, or local government or any agency or instrumentality thereof, to nonprofit associations or nonprofit corporations which are not themselves controlled or owned by profitmaking corporations or business enterprises, or to a holder where he provides without or at reduced charges a valuable benefit to the public or to the programs of the Secretary concerned, or to a holder in connection with the authorized use or occupancy of Federal land for which the United States is already receiving compensation for such lesser charge, including free use as the Secretary concerned finds equitable and in the public interest.

The applicable regulation, 43 CFR 2803.1-2(c), states:

(c) No fee, or a fee less than fair market rental, may be authorized under the following circumstances:

(1) When the holder is a Federal, State or local government or any agency or instrumentality thereof, excluding municipal utilities and cooperatives whose principal source of revenue is customer charges.

(2) When the holder is a nonprofit corporation or association which is not controlled by or is not a subsidiary of a profit making corporation or business enterprise.

(3) When a holder provides without charge, or at reduced rates, a valuable benefit to the public or to the programs of the Secretary.

Appellant describes itself as a nonprofit distribution cooperative supplying electric energy at retail to almost 6,000 customers in southwestern Colorado. It is member owned and is not a subsidiary of a profit making business or enterprise.

Despite the fact that subsection 1 of the above regulation expressly excludes cooperatives whose principal source of revenue is customer charges, appellant maintains that it is qualified for the exemption under this regulation. Appellant points to its nonprofit status as qualifying it under subsection 2. Appellant further claims it is exempt under subsection 3 because it provides service at cost to its members and thereby provides a valuable public benefit.

[1] We recently held in Socorra Electric Cooperative, Inc., 64 IBLA 65 (1982), and Tri-State Generation & Transmission Association, 63 IBLA 347, 89 I.D. (1982), that free use is restricted to agencies of the Federal Government and to those situations where the charge is token and the cost

of collection unduly large. 1/ Appellant is not an agency of the Federal Government, and while its rental charge is certainly token, BLM obviously has determined that the cost of collection is not unduly large. Therefore, appellant is not entitled to an exemption from rental fees.

Appellant is not entitled a lesser charge, since appellant's charges amount to the regulatory minimum of $25 for 5 years. See 43 CFR 2803.1-2(a). We note, however, that in Tri-State Generation & Transmission Association, supra, we held that the exclusionary language of 43 CFR 2803.1-2(c)(1) eliminates cooperatives whose principal source of revenue is customer charges from consideration for reduced charges under any category of 43 CFR 2803.1-2(c).

In Tri-State, we recognized that the regulation could have been drafted more precisely to make clear that the exclusion of cooperatives applied to all categories. We noted, however, that the preamble to the revised regulations stated, "REA cooperatives * * * whose principal source of revenue is customer charges will, hereafter, be charged fair market value fees." We further noted that it makes no sense logically to exclude cooperatives under the first category, yet let them qualify under subsections 2 or 3. Such a construction of the regulation would render the exclusion meaningless.

> While we realize that this is a departure from previous policy, the Secretary has indicated his intent through rulemaking to charge cooperatives, whose principal source of revenue is customer charges, fair market value fees. We are without authority to disregard this duly promulgated regulation. See Colorado-Ute Electric Association, Inc., 46 IBLA 35, 47 (1980), aff'd, Colorado-Ute Electric Association, Inc. v. Watt, No. 80-C-500 (D. Colo. Feb. 3, 1982).

63 IBLA at 355, 89 I.D. (1982).

1/ Our interpretation was based on the legislative history of section 504(g) of FLPMA, supra:

"Subsection (f). This subsection provides that no right-of-way shall be issued for less than 'fair market value' as determined by the Secretary. The proviso at the end of the subsection qualifies this standard where the application is a State or local government or a nonprofit association. In this case, the right-of-way may be granted for such lesser charge as the Secretary determines to be equitable under the circumstances. However, it is not the intent of this Committee to allow use of national resource land without charge except where the holder is the Federal Government itself or where the charge could be considered token and the cost of collection would be unduly large in relation to the return to be received."

S. Rep. No. 583, 94 Cong., 1st Sess. 72-73 (1975) (emphasis added).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

James L. Burski
Administrative Judge